

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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)  
IN THE MATTER OF THE WINDING DOWN OF: )  
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No. 217-2015-CV-00347

THE NEW HAMPSHIRE MEDICAL MALPRACTICE )  
JOINT UNDERWRITING ASSOCIATION )  
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**RECEIVER'S MOTION FOR APPROVAL OF  
ADMINISTRATION AGREEMENT WITH THE HAYS GROUP, INC.**

Roger A. Sevigny, Insurance Commissioner for the State of New Hampshire, as Receiver ("Receiver") of the New Hampshire Medical Malpractice Joint Underwriting Association ("NHMMJUA"), moves for approval of an Administration Agreement (the "Agreement") between the Receiver and The Hays Group, Inc. ("Hays"). A copy of the Agreement is attached as Exhibit A. As reasons therefor, the Receiver respectfully states:

1. Hays has been the manager of the NHMMJUA for many years pursuant to contracts with the NHMMJUA. As manager, Hays has operated and managed the NHMMJUA and provided most of the services necessary for the ongoing business of the NHMMJUA, including policy servicing and claims handling. Hays has managed the NHMMJUA during 2015 pursuant to the Servicing Carrier and Administration Agreement between the NHMMJUA and Hays dated December 26, 2014 (the "2014 Agreement"). Since the receivership commenced on July 24, 2015, Hays has provided services under the 2014 Agreement subject to limitations in a letter of delegation from the Receiver and in accordance with the direction of the Receiver. Affidavit of Peter A.

Bengelsdorf, Special Deputy Commissioner, in Support of Approval of Administration Agreement with The Hays Group, Inc. (“Bengelsdorf Aff.”) ¶ 3.

2. By its terms, the 2014 Agreement expires on December 31, 2015.

However, the services provided by Hays under the 2014 Agreement, in particular policy services and claims handling, will continue to be necessary at least until the offering process has been completed and the Court has approved an agreement with another insurer or insurers to assume and novate the coverage-related obligations of the NHMMJUA pursuant to RSA 404-C:16, II. The Receiver has accordingly negotiated the Agreement with Hays to provide for the continued operations of the NHMMJUA during the remainder of the receivership. The Agreement will only become effective upon approval of the Court. Agreement § I, first par. The 2014 Agreement will be terminated upon the effective date of the Agreement. Id. Bengelsdorf Aff. ¶ 4.

3. Under the Agreement, Hays agrees to operate and manage the NHMMJUA in accordance with directives of the Receiver through the date that the transaction contemplated by RSA 404-C:16, II closes. Agreement § I, second par. The Agreement recognizes that the Receiver will seek to transfer all incurred liabilities under policies issued by the NHMMJUA, the obligations under in-force policies issued by the NHMMJUA, and the contingent liability for structured settlements in the event the annuity purchased to fund such settlements were not to perform (the “Transaction”). Id. sixth Whereas clause. Hays agrees to manage the NHMMJUA through the date the Transaction closes, and at least until the incurred liabilities and obligations under in-force policies have been assumed by another insurer (the “Transaction Date”). Id. § I, second par. Bengelsdorf Aff. ¶ 5.

4. From the effective date of the Agreement to the Transaction Date, Hays will continue to provide the services it has provided to manage and operate the NHMMJUA, subject to the limitations of the Act and the Receiver's letter of delegation. Agreement §III. Those services include issuing renewal policies and handling claims. See id. § III(C) and (E). Hays will also assist the Receiver in connection with the winding down of the NHMMJUA, including handling of hardship grant applications and responding to requests for information in connection with the Transaction and cooperating with acquirers or purchasers of any NHMMJUA business. Id. § III(L). Bengelsdorf Aff. ¶ 6.

5. As part of the Transaction, another insurer will assume responsibility for the incurred liabilities and in-force policies and thus take over policy services and claims handling. Accordingly, the Agreement provides for Hays to provide more limited services after the Transaction Date, including assisting the Receiver in the winding down of the NHMMJUA and maintaining records of the NHMMJUA as directed by the Receiver. Agreement § IV. Bengelsdorf Aff. ¶ 7.

6. The 2014 Agreement provided for Hays to be paid \$77,500 per month for "normal policy services." It further provided that if material changes in operation result in significant increase in the servicing requirements, Hays and the NHMMJUA will reconsider the compensation. 2014 Agreement § IV. Since July 24, 2015, Hays has provided services in support of the Receiver that were not contemplated when the 2014 Agreement was entered. Hays accordingly requested additional compensation under the 2014 Agreement and sought higher monthly compensation when negotiating the new agreement. See Agreement fifth Whereas clause. After negotiation, the Receiver and

Hays agreed on a monthly compensation of \$85,250. This is a ten percent increase above the monthly rate in the 2014 Agreement and reflects additional services provided due to the receivership of the NHMMJUA. Bengelsdorf Aff. ¶ 8.

7. The Agreement provides for Hays to receive \$85,250 per month from the effective date through the Transaction Date and sixty days thereafter (to allow for a transition period to the new insurer). Agreement § V(A). The Agreement also provides for Hays to receive an additional \$7,750 per month from July 24, 2015 to the effective date of the Agreement to compensate for additional services provided under the 2014 Agreement due to the receivership. Id. § V(B). Amounts under both § V(A) and § V(B) will be prorated for partial months. The parties recognize that the Transaction may take different forms and that it may involve more than one acquirer and may not involve the transfer of all coverage-related obligations at one time. In that case, the Agreement provides for good faith negotiation over compensation depending on the scope of the Transaction and the services Hays will provide during the transition period. Id. § V(D). Bengelsdorf Aff. ¶ 9.

8. The Agreement further provides that after the Transaction Date and the sixty day transition period, Hays will be compensated on an hourly basis. Agreement § V(E). The hourly rates for Hays personnel are set forth on the attachment to the Agreement. Hays advises that those hourly rates are lower than it has charged other clients. Bengelsdorf Aff. ¶ 10.

9. Other provisions are set forth in the Agreement, including mutual indemnities for actions against one party arising from a failure to perform by the other (Agreement § VIII) and a limitation on liability arising from a determination that a

governing legislation or regulation is unconstitutional or illegal (id. § IX). These provisions continue provisions in the 2014 Agreement. The exclusive venue for any dispute arising out of the Agreement is the Court. Id. § X. Bengelsdorf Aff. ¶ 11.

10. The Receiver submits that the compensation and the terms of the Agreement are fair and reasonable and that the continued engagement of Hays to administer the NHMMJUA under the Agreement will further the efficient and economical operation of the receivership. Bengelsdorf Aff. ¶ 12.

WHEREFORE, the Receiver requests that the Court:

- a. Grant this motion;
- b. Enter an order in the form submitted herewith approving the Administration Agreement with The Hays Group, Inc.; and
- c. Grant such other relief as equity and justice may require.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE  
COMMISSIONER OF THE STATE OF NEW  
HAMPSHIRE, SOLELY AS RECEIVER OF THE  
NEW HAMPSHIRE MEDICAL MALPRACTICE  
JOINT UNDERWRITING ASSOCIATION

By his attorneys,

JOSEPH A. FOSTER  
ATTORNEY GENERAL

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December 3, 2015

**Certificate of Service**

I hereby certify that a copy of the foregoing Receiver's Motion for Approval of Administration Agreement with The Hays Group, Inc., the supporting Affidavit of Peter A. Bengelsdorf, and the Proposed Order, were sent this 3d day of December, 2015, by first class mail, postage prepaid to all persons on the attached service list.



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Eric A. Smith

NH Bar ID No. 16952

THE STATE OF NEW HAMPSHIRE

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No. 217-2015-CV-00347

**SERVICE LIST**

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Gordon J. MacDonald, Esq.  
Kevin M. Fitzgerald, Esq.  
Nixon Peabody LLP  
900 Elm Street, 14<sup>th</sup> Floor  
Manchester, NH 03101-2031

**ADMINISTRATION AGREEMENT**

This Agreement made and entered into on this 24<sup>th</sup> day of November, 2015, by and between Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, solely in his capacity as Receiver ("Receiver") of the New Hampshire Medical Malpractice Joint Underwriting Association (hereinafter referred to as the "NHMMJUA"), and The Hays Group, Inc. (hereinafter referred to as "Manager");

WHEREAS, The Insurance Commissioner of the State of New Hampshire ("Commissioner") pursuant to statutory authority granted under RSH 404-C:1 and RSA 400-A:15 by New Hampshire Insurance Rule No. 1700 et seq. effective September 30, 1975 established a joint underwriting association, formally named the New Hampshire Medical Malpractice Joint Underwriting Association; and

WHEREAS, on July 20, 2015 the Governor signed an Act providing for the winding down of the NHMMJUA through a receivership, 2015 N.H. Laws 263 ("Act"), and on July 21, 2015 the Commissioner filed a Verified Petition for Receivership of the NHMMJUA with the Merrimack County Superior Court (the "Court"); and

WHEREAS, on July 24, 2015, the Court issued an Order of Rehabilitation for the NHMMJUA appointing the Commissioner as its Receiver and Peter A. Bengelsdorf as Special Deputy Commissioner (the "Deputy") with all the powers of the Receiver; and

WHEREAS, the Receiver by Letter of Delegation dated August 4, 2015 (the "Letter") authorized the Manager to continue acting as administrator for the NHMMJUA in accordance with the Servicing Carrier and Administrative Agreement dated December 26, 2014 (the "Existing Contract") subject to certain limitations contained in the Letter (which is subject to amendment);

WHEREAS, the Manager has requested additional compensation in accordance with Section IV(B) of the Existing Contract for additional services performed on and after July 24, 2015 due to the receivership of the NHMMJUA; and

WHEREAS, pursuant to RSA 404-C:16, II, the Receiver will be seeking competitive bids to have all of the coverage-related obligations under policies issued by the NHMMJUA assumed by an insurer or insurers. Through this process, the Receiver will seek to transfer all incurred liabilities under policies issued by the NHMMJUA, the obligations under in-force policies issued by the NHMMJUA, and the contingent liability for structured settlements in the event that the annuity purchased to fund such settlements were not to perform (the "Transaction");

WHEREAS, the NHMMJUA and the Manager wish to mutually terminate the Existing Contract and replace it with this Agreement;

NOW, THEREFORE, the Receiver hereby appoints the Manager as administrator of the NHMMJUA and the Manager hereby accepts the appointment as said administrator all upon and subject to the following terms and conditions.

**I. MANAGEMENT OF THE NHMMJUA**

This Agreement shall only become effective (the "Effective Date") upon approval by the Court. The Receiver shall move for approval of this Agreement following execution by both Parties. The parties to this Agreement hereby agree that the Existing Contract is terminated in all respects by their mutual agreement on the Effective Date of this Agreement.

The Manager agrees to operate and manage the NHMMJUA through the date the Transaction closes and at least until the incurred liabilities under policies issued by the NHMMJUA and obligations under in-force policies issued by the NHMMJUA of the NHMMJUA have been assumed by an insurer or insurers (the "Transaction Date") and to provide transition services and support services thereafter, all as further specified below. The Manager shall conduct its duties hereunder in accordance with the directives of the Receiver. The Receiver shall keep the Manager informed concerning the status of the offering process, the Transaction, the motion or motions to the Court concerning approval of the Transaction, and the Transaction Date.

## **II. DURATION**

- (A) This Agreement shall be effective on the Effective Date and will continue in full force and effect until terminated in writing by either the Manager or the Receiver on ninety (90) days prior written notice to the other. Mailing of said Notice of Termination as provided in Section XII shall be deemed sufficient proof of notice. The Manager will provide all administration, underwriting and policyholder, and claims services through the date of the Transaction and support for the transition and receivership thereafter.
- (B) If either party of this Agreement shall be in default of the Agreement, and such default shall continue for thirty (30) days after written notice of such default is given to the party in default calling for the curing thereof, then at the election of the party not in default and upon written notice to the party in default this Agreement may be terminated no less than ten (10) days after the mailing of said written notice. In addition, the party not in default shall be entitled to claim and prove actual damages against the defaulting party and may resort to any other legal or equitable remedy.
- (C) Upon termination of the Agreement, all rights and obligations of the parties under this Agreement shall cease except as is otherwise provided in this Agreement. The Manager shall thereupon deliver to any person or organization designated in writing by the Receiver to receive the same, all records, claims files, reports and all other documents relating to the policies of insurance issued by the NHMMJUA. The Manager will provide an inventory of all records, claims files, reports and other documents delivered.

## **III. POWERS AND DUTIES OF THE MANAGER**

With respect to performing its duties as administrator of the business of the NHMMJUA, the Manager will have the following specific powers and duties through the Transaction Date:

- (A) To make available such of its own staffing, office space, facilities or equipment as are necessary for the performance of its duties hereunder; provided, however, that

any additional staffing, office space, facilities or equipment, which the Receiver determines is necessary or desirable shall be provided at the cost and expense of the NHMMJUA.

- (B) To provide such statistical services, either directly or through an advisory organization, as is required by the Receiver and keep such records with respect thereto as may be necessary.
- (C) Subject to the limitations and provisions of the Act, to provide and accept applications for renewal and to issue, deliver and service medical malpractice (and related coverage) liability insurance policies, including binders, riders and endorsements thereof, in the name of the NHMMJUA, executing the same on behalf of the NHMMJUA and collecting and depositing all premiums and fees due with respect thereto.
- (D) Subject to the Letter of Delegation, to keep accounts for, collect sums receivable for, pay sums owing for, and disperse funds on behalf of the NHMMJUA, all in accordance with prudent fiscal control. With the prior approval of the Receiver, the Manager shall establish such agency or custodian bank accounts of the NHMMJUA as it deems necessary or desirable, paying therefrom such sums as it is required to disburse including losses and allocated loss expenses, the Manager's compensation hereunder and producers' commissions. The Manager shall not pay any obligations of the NHMMJUA except from the NHMMJUA's own funds.
- (E) Subject to the Letter of Delegation, to adjust, settle, compromise, defend, litigate and pay losses and claims arising out of or in connection with the NHMMJUA policies, binders and applications on behalf of the NHMMJUA, including with respect thereto, the unlimited right to hire and discharge attorneys and to hire independent adjusters in those circumstances in which the use of adjusters regularly engaged by the Manager is impractical.

Manager agrees to provide claims services as above respecting all existing claims (open files) and all new claims reported up to the Transaction Date.

Upon the Transaction Date all obligations of the Manager to manage claims as above shall cease.

In the event this Agreement is terminated prior to the Transaction, the Manager shall manage claims as above up until 11:59 PM Eastern Time on the last day of the period in the notice of termination as provided herein.

- (F) To recommend, establish and maintain, subject to the approval of the Receiver, reserves on reported claims and incurred but not reported claims as are reasonable and proper. Reserves shall include allocated loss expense and provisions for any potential subrogation or other recovery.
- (G) To pay on behalf of the NHMMJUA, producer's commissions on NHMMJUA business produced in accordance with the commission schedule applicable.
- (H) To establish and follow reasonable underwriting rules, limits and standards, which shall not conflict with any rules, limits or standards established by the Receiver.
- (I) To act generally in the name of the NHMMJUA, including bringing and defending lawsuits in the ordinary course of business in the NHMMJUA's name, unless otherwise directed by the Receiver.
- (J) To keep a complete list of policyholders, including names, addresses, premiums, and policy number.
- (K) To perform such other administrative functions as the Receiver may, from time to time, determine as necessary and appropriate for the purpose of servicing NHMMJUA policies and claims or business of the NHMMJUA.
- (L) To assist the Receiver in connection with the winding down of the NHMMJUA as provided in the Act, including the preparation of financial statements, non-renewal of policies, calculation and return of tail coverage premium, handling of hardship grant applications, assisting in the preparation of requests for proposals for the Transaction, responding to requests for information in connection with any proposed transaction, cooperation with acquirers or purchasers of any

NHMMJUA business (including transfer of files, data and other records), assisting in the preparation of tax returns and audited financial statements, and providing the Receiver with analytic runs of information on reasonable request.

#### **IV. POWERS AND DUTIES OF MANAGER AFTER TRANSACTION DATE**

With respect to performing its duties as administrator of the business of the NHMMJUA, the Manager will have the following specific powers and duties after the Transaction Date:

- (A) To assist the Receiver in connection with the winding down of the NHMMJUA as provided in the Act, including the preparation of accounting and financial statements, processing non-renewals if required, handling of hardship grant applications, assisting in the preparation of tax returns and audited financial statements, and providing the Receiver with analytic runs of information on reasonable request.
- (B) To cooperate with acquirers or purchasers of any NHMMJUA business, including responding to questions and arranging transfer of files, data and other records.
- (C) To maintain any remaining records of the NHMMJUA as directed by the Receiver.

#### **V. COMPENSATION**

- (A) For the services described herein, the Manager shall be entitled to withdraw from the NHMMJUA's funds the sum of \$85,250 per month from the Effective Date through the Transaction Date and sixty days thereafter (prorated for any partial months) to provide support for the transition of coverage-related obligations and records relating thereto to an insurer or insurers.
- (B) For the additional services provided under the Existing Contract due to the receivership, the Receiver shall pay the Manager the sum of \$7,750 per month from July 24, 2015 to the Effective Date (prorated for any partial months) in addition to the monthly \$77,500 paid under the Existing Contract.

- (C) In the event that the Receiver requests additional services that go beyond the scope of those referenced in this Agreement, the expenses related thereto will be paid for on an hourly basis in accordance with the Attachment.
- (D) The Parties recognize that the Transaction may take different forms and that it may involve more than one acquirer and may not involve the transfer of all coverage-related obligations of the NHMMJUA at one time. In such event, the Parties will negotiate in good faith concerning the compensation to be paid to the Manager depending upon the scope of the Transaction and the services Manager will provide during the transition period.
- (E) For services in support of the Receiver after the Transaction Date and the period set forth in subsection (A) ends, Manager shall be entitled to compensation on an hourly basis at the rates set forth on the Attachment hereto, together with related out-of-pocket expenses. Manager shall provide the Receiver with a monthly invoice setting forth the hours spent by each individual and a summary of the services provided and any out-of-pocket costs incurred.

## **VI. MAINTENANCE OF RECORDS**

- (A) The Manager shall maintain complete, orderly and separate underwriting, accounting and claims files, records and accounts with respect to all transactions entered into on behalf of the NHMMJUA pursuant to this Agreement, in accordance with generally accepted insurance accounting principles, as required by law, and as reasonably directed by the Receiver.
- (B) The Manager shall render to the Receiver such financial statements, including monthly financial statements, and other reports and accounts with respect to the NHMMJUA's funds at such intervals as the Receiver shall reasonably request.
- (C) The Receiver and/or any designated representative thereof shall have the right at all times to inspect the books, records and files of the Manager so far as they pertain to the operations of the NHMMJUA, and shall have the right to copy or abstract such books, records and files at its own expense. It is agreed that any

required or requested examination or audit of the books or other records of the Manager with respect to its function as administrator of the NHMMJUA shall be done at the expense of the NHMMJUA.

- (D) The Parties recognize that in connection with the Transaction it will be necessary to provide an orderly transfer of records of coverage-related obligations of the NHMMJUA, including records, claims files, reports and other documents relating to the policies of insurance, and the Manager shall cooperate with the acquiring party or parties and the Receiver to transfer records as necessary in an orderly fashion. The Manager shall also cooperate with the Receiver to identify, retain and maintain such records as may be necessary to support the receivership and interpleader action after the Transaction.

## **VII. STATUS OF PARTIES**

Nothing herein shall be deemed to create the relationship of employer and employee between the NHMMJUA or the Receiver and the Manager, and any subcontracting party or agency thereof, it being understood and agreed that the Manager is an independent contractor with all the rights, powers and duties as such. In addition, the employees of the Manager are not employees of either the NHMMJUA, or the Receiver. Such employees shall at all times be under the sole control of the Manager.

## **VIII. INDEMNITY**

The NHMMJUA agrees to defend and indemnify the Manager for any claim or action against the Manager resulting from the NHMMJUA's failure to perform its obligations under this Agreement provided however that such defense and indemnification shall not extend to any claim or action in which the Manager shall be finally adjudged to have committed a breach of duty involving bad faith, dishonesty, willful misfeasance or reckless disregard with respect to its responsibilities. In the event of settlement of a claim or action before final adjudication, indemnification shall be provided only upon determination by the NHMMJUA that no such breach was committed, said determination not to be unreasonably withheld.

Manager agrees to defend and indemnify the NHMMJUA for any claim or action against the NHMMJUA resulting from the Manager's failure to perform its obligations under this Agreement provided however that such defense and indemnification shall not be provided on any claim or action in which the NHMMJUA shall be finally adjudged to have committed a breach of duty involving bad faith, dishonesty, willful misfeasance or reckless disregard with respect to its responsibilities. In the event of a settlement of a claim or action before final adjudication, indemnification shall be provided only upon determination by the Manager that no such breach was committed, said determination not to be unreasonably withheld.

#### **IX. LIABILITY**

Neither the Manager nor any of its affiliates, subsidiaries or subcontractors, or the officers, agents and employees of the Manager or any such affiliate, or subsidiary, or subcontractors shall have any liability to the NHMMJUA or to any other person or entity with respect to its or their performance or failure to perform under this Agreement in the event that any legislation, administrative regulations, or practice or procedure governing the operation of the NHMMJUA or the Manager as to its services hereunder, is found to be unconstitutional, illegal or otherwise unenforceable with respect to such services.

#### **X. GOVERNING LAW AND VENUE**

This Agreement shall be governed by and construed in accordance with the laws of the State of New Hampshire without regard to the conflicts of law provisions thereof. The Parties agree that the exclusive venue for any dispute between the Parties arising out of this Agreement shall be the Court.

#### **XI. EFFECT OF HEADINGS**

The section headings herein are for convenience only and shall not affect the construction hereof.

## **XII. NOTICE OF REQUIREMENTS**

When written notice is required to be given under and provision of this Agreement, such notice shall be sufficient if it is sent by certified mail, return receipt requested to the following address:

- |  |  |
|--|--|
| A.    New Hampshire Medical Malpractice<br>Joint Underwriting Association<br>in Receivership<br><br>c/o Insurance Department – State of<br>New Hampshire<br>Attn: General Counsel<br>21 South Fruit Street, Suite 14<br>Concord, New Hampshire 03301 | B.    Manager:<br><br>The Hays Group, Inc.<br>80 South 8 <sup>th</sup> Street #700<br>Minneapolis, Minnesota 55402 |
|--|--|

Or in the case of the Receiver, if delivered personally to the Receiver or the Deputy, or in the case of the Manager, to James Vaccarino

## **XIII. AMENDMENTS**

This Agreement may be modified, altered or amended only by a writing signed by an authorized representative of the Manager and of the Receiver.

## **XIV. ENTIRE AGREEMENT**

This writing constitutes the entire Agreement of the parties and no agent or employee of any party has authority to change this Agreement or to waive any of its provisions except as otherwise expressly provided herein.

In witness whereof the parties hereto set their hand the day and year first above written.

Roger A. Seigny, Insurance Commissioner of    The Hays Group, Inc.  
the State of New Hampshire, solely in his  
capacity as Receiver of the New Hampshire  
Medical Malpractice Joint Underwriting  
Association

By: Peter A. Bengelsdorf                      By: \_\_\_\_\_  
Special Deputy Commissioner

(Print) Peter A. Bengelsdorf                      (Print) \_\_\_\_\_

In witness whereof the parties hereto set their hand the day and year first above written.

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, solely in his capacity as Receiver of the New Hampshire Medical Malpractice Joint Underwriting Association      The Hays Group, Inc.

By: \_\_\_\_\_

(Print) \_\_\_\_\_

By:

 11/30/15

(Print)

Thomas J Honan

## ATTACHMENT

### HOURLY RATES

Individual/Function	Hourly Rate
Senior Staff, including Jim Vaccarino (Management-Boston) And Tom Honan (Management-Boston)	\$425
Underwriting and Claims, including Carrie Holland (Underwriting-Boston) and Patrick McGrath (Claims-New Hampshire)	\$300
Support, including Abby Olsen (Finance/Accounting-Minneapolis), Beth Lewis (Finance/Accounting-Minneapolis) Mary Grebauer (Finance/Accounting-Minneapolis) Dara Powers (Claims Associate-Boston) and Kathy Walz (Finance/Information Technology-Minneapolis)	\$200